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In the Supreme Court of the United States

OCTOBER TERM, 1995

MOBILE TELECOMMUNICATION TECHNOLOGIES CORP.; DESTINEER CORPORATION, PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Federal Communications Commission has the authority to impose a charge for a radio license that was based on auction prices paid for similar licenses, where the Commission determines that to issue the license free of charge would harm the public interest and might interfere with the auction of the similar licenses.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-28a) is reported at 77 F.3d 1399. The memorandum opinion and order of the Federal Communications Commission (Pet. App. 29a-71a) is reported at 9 FCC Rcd 3635.

JURISDICTION

The judgment of the court of appeals was entered on March 8, 1996. The court of appeals stayed its mandate for 30 days on May 22, 1996 (Pet. App. 74a), and the petition for a writ of certiorari was filed on June 20, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Federal Communications Commission (FCC or Commission) may issue licenses for use of the electromagnetic spectrum only where doing so will serve "the public interest, convenience, and necessity." 47 U.S.C. 309(a); see also 47 U.S.C. 307(a). Until 1982, mutually exclusive applications for licenses—*i.e.*, competing requests to use a single set of frequencies—were resolved through a time-consuming and expensive "comparative hearing" process. In 1982, Congress authorized the Commission to resolve mutually exclusive applications through the use of random selection, or lottery. Communications Amendments Act of 1982, Pub. L. No. 97-259, § 115, 96 Stat. 1094 (codified at 47 U.S.C. 309(i)). Shortly thereafter, the Commission began to hold lotteries to award various types of licenses. The lottery method became the favored procedure for licensing wireless mobile telecommunications services such as cellular telephony and paging.

Neither lotteries nor comparative hearings provided any assurance that the inventor of a new technology or service would receive a license to implement its own invention. Moreover, even where an innovator ultimately succeeded in winning a license, the delay built into these procedures often deprived the public of early enjoyment of new developments. Over time, therefore, the Commission became concerned that these methods for awarding licenses might actually discourage innovation in communications services. The Commission thus adopted a "pioneer's preference" program, under which a qualified license applicant that had "developed the capabilities or possibilities of the technology or service or ha[d]

brought them to a more advanced or effective state," 47 C.F.R. 1.402(a), could receive a license without facing competing applications and without participating in a comparative hearing or lottery. See *In re Establishment of Procedures to Provide a Preference to Applicants Proposing an Allocation for New Services*, 6 FCC Rcd 3488, 3492 (1991), recon., 7 FCC Rcd 1808 (1992), further recon., 8 FCC Rcd 1659 (1993).

2. In November 1991, petitioner Mobile Telecommunication Technologies Corp.[1] applied for a pioneer's preference to provide narrowband personal communications services (narrowband PCS), a type of paging or "beeper" service resembling, but far more advanced than, currently available paging service. After notice and comment, the Commission granted petitioner's request for a narrowband PCS preference, *In re Amendment of the Commission's Rules to Establish New Personal Communications Services, First Report and Order*, 8 FCC Rcd 7162 (1993), and invited petitioner to apply for a license, FCC Public Notice, No. 41645, Commission Invites Filing of Narrowband Personal Communications Service Pioneer's Preference Application (Feb. 3, 1994). Petitioner filed its application for a license in

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[1] Petitioner Mobile Telecommunication Technologies Corp. (Mtel), the original recipient of the pioneer's preference at issue, asked the FCC to issue the license granted pursuant to that preference to Nationwide Wireless Network Corp. (NWN Corp.), which was Mtel's wholly owned subsidiary. See Pet. 1 n.1; Pet. App. 29a-30a n.1. NWN Corp. has been renamed "Destineer Corporation," which appears with Mtel as a petitioner in this case. See Pet. 1 n.1. For ease of exposition, we refer to Mtel and Destineer Corporation collectively as "petitioner."

February 1994. The Commission granted no other narrowband PCS preferences.

In August 1993, after the Commission had awarded petitioner a pioneer's preference but before it had issued a license, Congress authorized the Commission to use a "competitive bidding" method (*i.e.*, an auction) to award certain radio licenses, including narrowband PCS licenses. Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 6002(a), 107 Stat. 388 (codified at 47 U.S.C. 309(j)). The auction statute did not, however, authorize the Commission to apply its bidding procedures to applicants who had won pioneer's preferences. Auctions were limited to mutually exclusive applications, and the applications of preference winners were not subject to competing applications. Congress made clear, moreover, that its provision of an auction option did not require the Commission to eliminate the pioneer's preference program. See 47 U.S.C. 309(j)(6)(G).

The Commission undertook a rulemaking proceeding to determine the effect of its new auction authority on the pioneer's preference program. See *In re Review of the Pioneer's Preference Rules, Notice of Proposed Rulemaking*, 8 FCC Rcd 7692, 7692-7693 (1993). The Commission initially stated that its review of pioneer's preference rules would not affect the narrowband PCS proceedings in which petitioner had already been granted a preference. *Id.* at 7694-7695; accord *In re Amendment of the Commission's Rules to Establish New Personal Communications Services, Memorandum Opinion and Order*, 9 FCC Rcd 1309, 1315-1316 (1994). On further consideration, however, the Commission determined that it would harm the public interest to grant any PCS pioneer, including petitioner, a free license. In a

determination that petitioner does not challenge in this Court, the Commission reasoned that giving one narrowband PCS provider a free license, while requiring its competitors to pay millions of dollars at auctions for their licenses, could seriously distort both the market and the auction itself. Pet. App. 42a-50a.

Having found that the public interest required petitioner to pay for its license, Pet. App. 48a, the Commission considered whether it has the authority to require such a payment and determined that it does. *Id.* at 50a-59a. The Commission based that determination principally on Section 4(i) of the Communications Act of 1934, 47 U.S.C. 154(i), in conjunction with Sections 303(r), 307 and 309. 47 U.S.C. 303(r), 307, 309. Section 4(i) authorizes the Commission to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this [Act], as may be necessary in the execution of its functions."

The Commission determined that requiring payment is "necessary in the execution of its functions" under several statutory commands. First, having already found that granting a free license would harm the public interest, the Commission determined that issuing such a license would violate the public interest requirements of Sections 307(a) and 309(a). Pet. App. 57a n.104; see also 47 U.S.C. 303(r) (Commission may impose necessary conditions on radio licenses). Second, Section 309(j) requires the Commission to "design and conduct a rational and fair auction for narrowband PCS licenses," Pet. App. 57a, and giving petitioner a free license would violate that command "because such a grant would create a competitive imbalance in PCS markets and because

granting a free license regardless of its value would alter the competitive market and distort the statutory auction process." *Id.* at 57a-58a. Finally, giving petitioner a free license would unjustly enrich it in violation of 47 U.S.C. 309(j)(3)(C). Pet. App. 70a (separate statement of Commissioner Ness); see also *In re Review of the Pioneer's Preference Rules, Memorandum Opinion and Order on Remand*, 9 FCC Rcd 4055, 4059 (1994) (applying same reasoning to require "broadband" PCS pioneers to pay for their licenses).

The Commission thus required petitioner to pay for its license, albeit at a significantly lower price than that ultimately paid by the auction participants.[2] Petitioner then filed a petition for review in the United States Court of Appeals for the District of Columbia Circuit.

3. The court of appeals denied petitioner's petition for review in part and granted it in part. Pet. App. 1a-28a. First, the court upheld the Commission's determination that it had the authority to require payment from petitioner. It rejected petitioner's argument that by specifying two methods by which the Commission could charge for a license—an application fee

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[2] The Commission fixed the cost at the lower of 90% of or $3 million less than the lowest winning bid. Pet. App. 49a. The auction ultimately produced a lowest winning bid of $37 million, 90% of which is approximately $33 million. The highest winning bid was $80 million, and the average of the ten winning bids was about $62 million. In addition to its pioneer's preference license, petitioner bid on and won two other narrowband PCS licenses, one for $80 million and one for $47.5 million. See FCC Public Notice, Announcing the High Bidders in the Auction of Ten Nationwide Narrowband PCS Licenses, at 1 (Aug. 2, 1994).

under 47 U.S.C. 158(g)[3] or an auction under 47 U.S.C. 309(j)—Congress had necessarily prohibited the Commission from assessing charges in any other way. The court observed that "the expressio unius maxim—that the expression of one is the exclusion of others— * * * has little force in the administrative setting," and that, in any event, "the nature of Congress's [1993] auction authorization more supports than undermines the Commission's decision here." Pet. App. 7a. Specifically, by "sharply widen[ing] the *incremental* benefit accruing to a preference, vis-a-vis other would be license holders," the 1993 legislation had given rise to the Commission's authority to "reduce th[at] gulf" as part of its more general mandate to protect the public interest, convenience and necessity. *Id.* at 9a; see also *id.* at 11a.

Having concluded that the Commission had the authority to charge petitioner for the license, the court nevertheless remanded the Commission's decision to exercise that authority on the facts of this case. The court held that the Commission had not given petitioner an adequate opportunity to argue that its asserted reliance interest in obtaining a free license should affect the Commission's public interest determination. The court also held that the Commission had not addressed petitioner's argument that others were obtaining similar licenses for paging systems without having to pay for them. Accordingly, the court remanded the case for the Commission to consider those issues. Pet. App. 12a-13a.[4]

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[3] The statutory application fee for petitioner's license was $230. See Pet. 4-5.

[4] The court of appeals rejected a separate challenge, brought by a competing preference applicant, to the Commis-

Chief Judge Edwards dissented. He concluded, among other things, that neither the 1993 auction legislation nor the FCC's general grant of authority under Section 4(i) justified charging for a license that was not subject to auction under the 1993 statute. Pet. App. 25a-27a.

ARGUMENT

1. As an initial matter, the petition should be denied because, given the procedural posture of this case, this Court's review would be premature. Petitioner challenges the court of appeals' holding that the Commission had authority to charge petitioner for its license. The court also held, however, that the Commission had not adequately justified its exercise of that authority, and it remanded the matter to the agency for further consideration of petitioner's asserted reliance interests and its claim of inconsistent treatment. On remand, the Commission may, among its several options, choose not to impose any charge at all, a decision that would end any controversy between the parties. Thus, "because the Court of Appeals remanded the case, it is not yet ripe for review by this Court." *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967); accord *Virginia Military Institute* v. *United States*, 508 U.S. 946, 946 (1993) (opinion of Scalia, J., respecting the denial of certiorari) (citing cases); Robert L. Stern and

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sion's award of a preference and a license to petitioner. See Pet. App. 14a-20a. No party has sought review of that aspect of the court's decision.

Eugene Gressman, *Supreme Court Practice* § 4.18, at 196 (7th ed. 1993).[5]

2. Quite apart from that threshold concern, the petition should be denied because the issue presented is not of continuing importance. This dispute concerns a single license for which the Commission imposed a charge in circumstances that are unique to that license and will not recur. The decision to charge for the license was the product of the Commission's one-time attempt to reconcile its pioneer's preference program with a fundamental change in the licensing regime. Because Congress recently enacted a statute (the "GATT legislation") requiring the FCC to charge future pioneer's preference recipients for their licenses, see Uruguay Round Agreements Act, Pub. L. No. 103-465, § 801, 108 Stat. 4809 (codified at 47 U.S.C. 309(j)(13)), see also Pet. App. 10a n.1, the Commission's decision will have little or no effect on any other licensee.

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[5] In the order under review, the Commission noted that it will not collect any payment from petitioner until its orders "are no longer subject to administrative reconsideration or judicial review." Pet. App. 66a. Thus, petitioner will suffer no harm from a delay in further review of its claim, should such review become necessary. Moreover, if a live dispute between the parties persists after remand, petitioner will retain its right to present to this Court any claim that it has raised in this petition. See, *e.g.*, *Urie* v. *Thompson*, 337 U.S. 163, 172-173 (1949); Robert L. Stern and Eugene Gressman, *Supreme Court Practice* § 4.18, at 198 (7th ed. 1993) ("[d]enial of certiorari at the interlocutory stage of a proceeding is without prejudice to renewal of the questions presented when certiorari is later sought from the final judgment, assuming the questions are properly preserved in the lower courts after the original denial").

Petitioner contends that the court of appeals has broadly granted the FCC "'the power to do whatever it pleases merely by virtue of its existence,'" Pet. 15 (quoting Pet. App. 26a (Edwards, C.J., dissenting in part)), and "the power to do anything that Congress has not explicitly prohibited [it] from doing," Pet. 18. But the court of appeals did no such thing. Instead, it determined that the Commission's general statutory authority to act in the public interest authorizes it, in the unique circumstances of this case, to deny petitioner the unfair windfall that an unqualified application of the Commission's own creation—the pioneer's preference program—would confer. At bottom, the court's holding is confined to a narrow rejection of the "untenable" argument at the heart of petitioner's position: that "[b]ecause the Commission *before* the 1993 amendment of the Communications Act had provided for an *exception* to what was then its only way of issuing licenses for which there was competition, Congress forbade it [in 1993] from *qualifying that exception*," Pet. App. 8a-9a, even though doing so would be entirely consistent with the revised statutory scheme and in furtherance of the public interest committed to the Commission's charge.

Similarly, petitioner argues (Pet. 14) that the court of appeals' holding will grant "sweeping new powers to other administrative agencies" that have "necessary and proper" clauses in their organic statutes. Again, nothing in the decision below supports that view. In any event, the proper occasion to address petitioner's hypotheticals (see Pet. 15-17) concerning imaginary administrative abuses—perpetrated by other agencies under other statutory schemes—is if and when those hypotheticals ever become reality.

3. On the merits, petitioner's principal argument is that application fees and auction monies "are the only types of assessments the Commission is authorized to collect in connection with telecommunications licenses," Pet. 20, and that the license charge at issue here is therefore inconsistent with the Communications Act. In other words, petitioner relies, without saying so expressly, on the *expressio unius* rationale rejected by the court of appeals, and claims that "this rule applies with special force in the administrative context." Pet. 21.

As the court of appeals correctly observed, however, "[t]he [*expressio unius*] maxim has little force in the administrative setting," in which courts should "defer to an agency's interpretation of a statute unless Congress has directly spoken to the precise question at issue." Pet. App. 7a (internal quotation marks omitted) (citing *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837, 842 (1984)). This Court too has rejected efforts to use a similar rationale to impair the FCC's general statutory authority to effectuate the purposes of the Communications Act. In *United States* v. *Southwestern Cable Co.*, 392 U.S. 157 (1968), citing the Commission's "comprehensive mandate" and "expansive powers" to fulfill that mandate, *id.* at 173, this Court declined to "limit[] the Commission's authority to those activities and forms of communication that are specifically described by the Act's other provisions." *Id.* at 172; see also *Permian Basin Area Rate Cases*, 390 U.S. 747, 780 (1968) ("We are, in the absence of compelling evidence that such was Congress' intention, unwilling to prohibit administrative action imperative for the achievement of an agency's ultimate purposes."). Indeed, "underlying the whole Communications Act is recognition of the

rapidly fluctuating factors characteristic of the evolution of broadcasting and of the corresponding requirement that the administrative process possess sufficient flexibility to adjust itself to these factors." *Southwestern Cable Co.*, 392 U.S. at 172-173 (internal brackets and quotation marks omitted).

In other cases as well, courts have upheld the Commission's exercise of general statutory authority to regulate in the public interest even in the absence of a specific statute narrowly authorizing such regulation: *e.g.*, prescribing rates of return where the statute expressly authorized only the prescription of actual rates, see *Nader* v. *FCC*, 520 F.2d 182, 204 (D.C. Cir. 1975); requiring a "connecting" telephone company to file a tariff even though the tariff statute exempted connecting carriers, see *Lincoln Telephone & Telegraph Co.* v. *FCC*, 659 F.2d 1092 (D.C. Cir. 1981); ordering payment of refunds to customers as a means of enforcing a prescribed rate of return, see *New England Telephone & Telegraph Co.* v. *FCC*, 826 F.2d 1101 (D.C. Cir. 1987); promulgating newspaper-broadcasting cross-ownership restrictions, see *FCC* v. *National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978); and imposing equal employment opportunity standards on broadcast licensees, see *Office of Communications of the United Church of Christ* v. *FCC*, 560 F.2d 529 (2d Cir. 1977). In each instance, the Commission determined, and the reviewing court agreed, that regulation not specifically provided for by statute was "necessary" to fulfill statutory objectives.[6]

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[6] In an argument addressed by neither the majority nor the dissent below, petitioner suggests (Pet. 19-20) that the nondelegation doctrine requires courts to adopt a narrow con-

That is precisely what happened here. When Congress revolutionized the methods by which the Commission may award licenses by adding an auction option, the Commission needed to adapt preexisting programs, such as pioneer's preferences, to the new regime. The Commission determined that granting free licenses to pioneers when others would have to pay millions of dollars at auctions for similar licenses could interfere with both the narrowband PCS auction and the wireless communications market itself—contrary to the Commission's statutory obligations to issue licenses only insofar as they serve the public interest, 47 U.S.C. 309(a), 307(a), 214, and to "make available * * * a[n] * * * efficient * * * radio communication service." 47 U.S.C. 151. Moreover, granting free licenses in these circumstances would contravene the Commission's addi-

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struction of any congressional delegation of authority to collect fees. Even if this case involved delegation of Congress's constitutional authority to raise revenue, this Court has unanimously held that such delegation "is subject to no constitutional scrutiny greater than that we have applied to other nondelegation challenges." *Skinner* v. *Mid-America Pipeline Co.*, 490 U.S. 212, 223 (1989). The *Skinner* Court added that *National Cable Television Ass'n* v. *United States*, 415 U.S. 336 (1974), upon which petitioner principally relies for its contrary view (see Pet. 19), "stand[s] *only* for the proposition that Congress must indicate clearly its intention to delegate to the Executive the discretionary authority to recover administrative costs *not inuring directly to the benefit of regulated parties* by imposing additional financial burdens * * * on those parties." 490 U.S. at 224 (emphasis added); see also *United States* v. *Sperry Corp.*, 493 U.S. 52, 60-61 (1989) (discussing similar issues under Takings Clause). That concern is inapplicable here, for the Commission has charged petitioner only for the value—indeed, *less* than the fair market value, see note 2, *supra*—of petitioner's own license.

tional statutory obligation to ensure that auctions not result in unjust enrichment. 47 U.S.C. 309(j)(3)(C). The court of appeals correctly deferred to "the Commission's judgment regarding how the public interest is best served," Pet. App. 11a (quoting *FCC* v. *WNCN Listeners Guild*, 450 U.S. 582, 596 (1981)), a judgment that petitioner does not challenge in this Court.[7]

In sum, the court of appeals' holding simply affirms the Commission's general statutory authority to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with [the Communications Act], as may be necessary in the execution of its functions," 47 U.S.C. 154(i), and to "prescribe such * * * conditions, not inconsistent with law, as may be necessary to carry out the provisions of" the Act, 47 U.S.C. 303(r). Accepting petitioner's assertion that the Commission may act only where Congress has narrowly and specifically authorized it to do so would read those provisions out of the Communications Act.[8]

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[7] Petitioner suggests (Pet. 22-23) that the court of appeals improperly based its decision to uphold the license charge on an inference that the auction statute embodies a general congressional intent to use the licensing process to raise money. However, the court of appeals adopted no such reasoning, and neither did the Commission. The court held only that the Commission was entitled to "reduce the gulf between recipients of preferences and other license applicants," Pet. App. 9a, so long as the result would be—as here—entirely consistent with the statutory scheme that Congress created in its 1993 legislation. See *ibid.*

[8] In a similar vein, petitioner argues (Pet. 20-21) that Congress's enactment of the GATT legislation, which required broadband PCS pioneers to pay substantial sums for their licenses but does not apply to petitioner's far less costly

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1996

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narrowband PCS license, forecloses Commission discretion to charge petitioner for that license. That claim is without merit. As the court of appeals held, "Congress was silent about the treatment of narrowband license recipients" in the GATT legislation. Pet. App. 10a n.1. Thus, to the extent that Congress intended to treat the two groups of pioneers differently, "the Commission's decision—that it was authorized but not directed to charge—would nevertheless be consistent with the amendment." *Ibid.* Petitioner's argument boils down to another application of the *expressio unius* maxim, which is no more persuasive with respect to the GATT legislation than with respect to the Communications Act.